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In the Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 116

JOSEPH E. LIFSCHUTZ, M. D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO,
Respondent,

MOTION OF NATIONAL ASSOCIATION FOR MENTAL HEALTH FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Association for Mental Health (hereinafter denoted as NAMH) moves for leave to file a brief amicus curiae in this case in support of the petitioner's request for a writ of certiorari.

Counsel for petitioner has consented to the filing of such brief, but counsel for John Arabian, George J. Arabian and Isabelle H. Arabian, the real parties in interest, has refused his consent.

In the Supreme Court
of the
United States

October Term, 1968

No. 1395

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Petitioner,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO,
Respondent,

MOTION OF NATIONAL ASSOCIATION FOR MENTAL HEALTH FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE / AND BRIEF AMICUS CURIAE

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INTEREST OF THE ASSOCIATION

NAMH is a nonprofit corporation, representing citizens throughout the United States working to improve care and treatment of the mentally ill and to promote mental health.

The issue in this case, whether a psychotherapist has a constitutional privilege to refuse to divulge confidences of his patients, is of concern not only for therapists, such as the petitioner, but equally so for patients and therefore also for all those interested in the welfare of the mentally ill, including the members of NAMH, its state divisions and its local chapters.

REASON FOR FILING A BRIEF AMICUS CURIAE

The petitioner's contention is that for a state to compel him to disclose confidences of a patient impairs his ability to practice his profession and thus violates his rights under the United States Constitution. But any impairment of the therapist's ability to treat patients impairs the interests of the patients at least as much as those of the therapist. Indeed, it seems correct to say that the reason why the petitioner and others in his profession should be held to have a constitutional right to practice their profession without unreasonable restraints is that such practice serves a vital public interest by ministering to the needs of mentally ill patients. The NAMH asks leave to supplement the petitioner's arguments by emphasizing the interest in the issue presented, and the constitutional rights, of patients and potential patients – which in effect means every person in the United States.

A STATE MAY NOT CONSTITUTIONALLY COMPEL BREACH OF CONFIDENTIALITY OF COMMUNICATIONS BETWEEN A PSYCHIATRIC PATIENT AND HIS THERAPIST

The rights of patients are properly before the court. In this case, as in *Griswold v. Connecticut*, 381 U. S. 479 (1965),

the petitioner has standing to raise the constitutional rights of the persons with whom he has a professional relationship.

That what a physician is told by his patient in confidence is to be kept confidential has been an accepted precept of medical ethics at least since the time of Hippocrates. The assurance of confidentiality is particularly important in the treatment of mental illness. The psychiatrist must insist on very personal data, and must explore the relationship of the patient's acts to his basic drives, which can only be adequately revealed by his deepest and most secret thoughts and feelings. This is ture not only in psychoanalysis but in all psychotherapy.

A person seeking such therapy may confess to marital infidelities, perverse sexual behavior or other conduct which might incriminate him in criminal or other litigation. He would be hesitant to speak frankly to his therapist about such matters if he knew the latter could later be compelled to reveal them in open court and he might feel constrained from exercising his right to consult a physician if he knew that to do so might entail such revelation.

"What is more, the patient's statements may reveal to his therapist much more than the patient intends or realizes. The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what is expected of them, and that they cannot get help except on that condition. It is extremely hard for them to bring themselves to the point where they are willing to expose the dark recesses of their mind to the psychiatrist . . . . It would be too much to expect them to do so if they knew that all they say – and all that the psychiatrist learns from what they say – may be revealed to the whole world from a witness stand." Guttmacher and Weihofen, Psychiatry and the Law 272 (1952).

For a state to compel such revelation therefore seriously obstructs access of all mentally ill persons to therapy, and thus interferes with their constitutional right to consult a physician and to seek treatment. This interference constitutes a deprivation of due process of law, in that it invades the freedom of speech and the rights of privacy guaranteed by the First,

Fourth and Fifth Amendments, and applicable against the states through the Fourteenth.

"A state may not," as this Court has said, "consistently with the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* 381 U. S. 479, 482. Freedom of speech includes the right to receive information as well as to impart it – "indeed the freedom of the entire university community." Id. The right to receive professional medical advice and therapy is surely as essential a part of this freedom as the right to study a foreign language, *Meyer v. Nebraska,* 313 U. S. 236, or the right to educate oneself or one's children as one chooses. *Pierce v. Society of Sisters,* 268 U. S. 510.

The Fifth Amendment in its self-incrimination clause "enables a citizen to create a zone of privacy which government may not force him to surrender to his detriment." And the Fifth together with the Fourth Amendment protects against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Griswold v. Connecticut, supra.* Whatever may be the proper limits of the concept of a "right of privacy," it must include, if it means anything, the inviolability of confidences about abnormal and anti-social behavior and bizarre and unacceptable thoughts and feelings that people are unwilling to expose except in the privacy of the psychotherapeutic relationship.

THE CALIFORNIA STATUTES RESTRICTING RECOGNITION OF THE PRIVILEGE ARE OVERBROAD

California recognizes a legal privilege to prevent the revealing in court of information communicated by patients to their therapists in confidence. The NAMH does not contend that this privilege may not be reasonably limited. Indeed, it is recognized that authorities on the law of evidence have been critical of the privilege and some have urged its abolition. But the objections have been leveled at abuses in non-psychiatric cases – personal injury suits, for example. A person who has been struck by an automobile is not likely to have any legiti-

mate interest in keeping the extent of his injuries secret. On the contrary, he is usually eager to round up as many witnesses as he can to testify to what happened and to the extent of his injuries. If he objects to the testimony of a doctor who treated him, it is not because he wants to keep his injuries secret, but almost certainly because he fears the doctor will testify that he was not appreciably injured at all.

But mental injury or ill health is still a matter of which many people are ashamed and which they want to hide. Although there may be no reason to suppose that the automobile accident plaintiff intends his consultation with a doctor to be confidential, there is every reason to assume that the psychiatric patient so intends.

California may properly restrict the privilege so as to curb abuses shown to exist. But the California statutes undertake to restrict the privilege in a relationship where it is essential to treatment, where its restriction impairs constitutional rights and where no abuses have been shown.

In particular, the provision of the California statute that the privilege is waived if a person, at any time after treatment, puts his medical and emotional condition in issue in a law suit, Cal. Evidence Code Secs. 996(a), 1016(a), operates to constrain persons from seeking psychiatric care and treatment. As said, a person seeking such care and treatment must accept the requirement that he be completely frank in his "free association" verbal production. He is not likely to feel so free unless the therapist can assure him of absolute confidentiality, especially because the patient cannot know at the outset what fears and fantasies he may reveal as treatment progresses, perhaps because some of these are so buried in his unconscious that he does not himself know that they exist. And since, as already said, he does not know what his verbal productions may reveal to the therapist over and beyond what his words express, it is unrealistic to say that if, perhaps years later, he puts his mental condition in issue in some case at law, he thereby waives his privilege and consents to the therapist's disclosing all that he had said and all that his words revealed about him. All patients as a class, and all persons who may contemplate consulting a therapist for mental illness or emotional disturbance, will to some extent be intimidated and

deterred by the spectacle of therapists being haled into court and compelled in a public trail to reveal confidences of patients, and by the realization that anything they tell a therapist may similarly be exposed if at any time in the future they do any act, whether intentionally, inadvertently, or by neurotic impulse, that the law deems to constitute a waiver.

CONCLUSION

The California statutory provision that putting one's mental or emotional condition at issue in a law suit automatically constitutes a waiver of the privileged status of communications confided to one's psychotherapist, no matter how long in the past, operates to intimidate and deter persons from exercising their constitutional right to consult a therapist and to obtain care and treatment for mental illness. Whether a state may thus impair this vital personal right has never been decided by this Court. NAMH therefore respectfully urges that the Writ of Certiorari issue.

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